

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel. W.A. )  
DREW EDMONDSON, in his capacity )  
of ATTORNEY GENERAL OF THE )  
STATE OF OKLAHOMA and )  
OKLAHOMA SECRETARY OF THE )  
ENVIRONMENT C. MILES TOLBERT, )  
in his capacity as the TRUSTEE FOR )  
NATURAL RESOURCES FOR THE )  
STATE OF OKLAHOMA, )

Plaintiffs, )

vs. )

Case No. 05-CV-0329-TCK-SAJ

1. TYSON FOODS, INC., )
2. TYSON POULTRY, INC., )
3. TYSON CHICKEN, INC., )
4. COBB-VANTRESS, INC., )
5. AVAIGEN, INC., )
6. CAL-MAINE FOODS, INC., )
7. CAL-MAINE FARMS, INC., )
8. CARGILL, INC., )
9. CARGILL TURKEY )  
PRODUCTION, LLC, )
10. GEORGE’S, INC., )
11. GEORGE’S FARMS, INC., )
12. PETERSON FARMS, INC., )
13. SIMMONS FOODS, INC., and )
14. WILLOW BROOK FOODS, INC., )

Defendants. )

**PETERSON FARMS, INC.’S REPLY TO STATE OF OKLAHOMA’S  
RESPONSE IN OPPOSITION TO “PETERSON FARMS, INC.’S OPPOSED  
MOTION FOR LEAVE TO FILE SUR-REPLY ON ITS MOTION TO DISMISS”**

Defendant Peterson Farms, Inc. (“Peterson”) hereby submits its Reply to the State of Oklahoma’s Response in Opposition to “Peterson Farms, Inc.’s Opposed Motion for Leave to File Sur-Reply on Its Motion to Dismiss” (Dkt. #990) and, again, requests leave to file a Sur-Reply to

its Motion to Dismiss or, in alternative, Stay (Dkt. ## 75, 90). In support of its Reply, Peterson states as follows:

The State has not articulated a single, persuasive reason that the Court should deny Peterson's Motion for Leave to File Sur-Reply on Its Motion to Dismiss (Dkt. #973). Instead, the State—using its own characterizations—“rehash[es]” and “respin[s]” the “nonsensical” hyperbole—if not outright hypocrisy—and “bald assertion[s]” it has presented in opposition to other issues brought before this Court. For example, the State's first argument in opposition to Peterson's Motion for Leave is that supplemental briefs are not favored under the Local Civil Rules. *See* LCvR 7.2(h). However, the State fails to mention that it has moved the Court for leave on four prior occasions to file supplemental briefs of its own (Dkt. ## 161-164). Notably, the Court has granted leave for the State to file its supplemental briefs upon these occasions. The State further fails to acknowledge that, in opposition to those motions, Peterson and the other Defendants raised issues similar to those the State now adopts as its own.

The State also contends that Peterson has not stated adequate or sufficient grounds to justify another round of briefing. However, when the State sought leave to file its aforementioned supplemental briefs, the reasons it provided for filing the supplements were substantially the same as those relied upon by Peterson in its Motion for Leave. Indeed, in its prior briefing, the State made the salient and indisputable point that, whether a supplemental brief is filed or not, the decision is within the Court's discretion (Dkt. #171). The State has also stated that “[t]he fundamental issue presented is whether the supplemental brief assists the Court in understanding and resolving the issues before it.” (Dkt. #171). Peterson concurs that this should be the measure the Court considers in exercising its discretion to allow filing of supplemental briefs, such as Peterson's Sur-Reply, and

Peterson has not the slightest doubt that its Sur-Reply will assist the Court in understanding the issues before it.

As its second argument, the State urges the Court to deny Peterson's Motion for Leave because Peterson has purportedly failed to cite any new cases or materials in its proposed Sur-Reply that could possibly assist the Court in resolving the issues before it. A cursory review of the proposed Sur-Reply, however, reveals that it contains numerous legal authorities and other materials that were not in existence when Peterson filed its Motion to Dismiss or, in the alternative, Stay (Dkt. ##75, 90) on October 3, 2005. For example, Oklahoma House Bill No. 2604, passed in 2006; *United States v. Hubenka*, 438 F.3d 1026 (10<sup>th</sup> Cir. 2006); and *Lankford v. Sherman*, 451 F.3d 496 (8<sup>th</sup> Cir. 2006) are all relevant to and support the Clean Water Act and cooperative federalism arguments contained in the proposed Sur-Reply. Likewise, other materials cited in the proposed Sur-Reply—such as ODAFF Strategy for Restoration and Protection of Scenic River Watersheds Through Nutrient Management of Agricultural Activities (Jan. 2006) and the September 2006 media coverage cited in footnote 7 regarding the Arkansas-Oklahoma Arkansas River Basin Compact Commission—further compel the conclusion that this lawsuit should be stayed under the doctrine of Primary Jurisdiction until such time as the designated administrative agencies address the issues alleged in the State's First Amended Complaint. As such, the Sur-Reply satisfies the standard that the State agrees applies to such supplemental motions: it will assist the Court in understanding the issues before it.

The State's final argument in opposition to Peterson's Motion for Leave is, in fact, a response to the substance of the proposed Sur-Reply. Since the State has responded to a brief that has not yet been filed, it is only fair that Peterson be allowed to file the Sur-Reply. The State's

incidental argument that an additional round of briefing on the Clean Water Act issues addressed in the proposed Sur-Reply is not justified is rendered moot by its substantive response to Peterson's yet-to-be-filed brief. In short, the State cannot reasonably argue that the Sur-Reply is not justified when it has seen fit to oppose—not only the procedural aspects of Peterson's Motion for Leave—but the substance of a proposed filing that will assist the Court in understanding and resolving the issues before it. Consequently, Peterson's Motion should be granted.

WHEREFORE, Defendant Peterson Farms, Inc. prays that the Court grant it leave to file the attached Sur-Reply to the State of Oklahoma's Supplemental Brief in Opposition to Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay the Proceedings (Dkt. #869).

Respectfully submitted,

By /s/ Philip D. Hixon  
A. Scott McDaniel (Okla. Bar No. 16460) [smcdaniel@jpm-law.com](mailto:smcdaniel@jpm-law.com)  
Chris A. Paul (Okla. Bar No. 14416)  
Nicole M. Longwell (Okla. Bar No. 18771)  
Philip D. Hixon (Okla. Bar No. 19121)  
JOYCE, PAUL & McDANIEL, PLLC  
1717 South Boulder Ave., Suite 200  
Tulsa, Oklahoma 74119  
(918) 599-0700  
and  
Sherry P. Bartley (Ark. Bar No. 79009)  
*Appearing Pro Hac Vice*  
MITCHELL, WILLIAMS, SELIG,  
GATES & WOODYARD, P.L.L.C.  
425 W. Capitol Ave., Suite 1800  
Little Rock, Arkansas 72201  
(501) 688-8800

**COUNSEL FOR DEFENDANT  
PETERSON FARMS, INC.**

## CERTIFICATE OF SERVICE

I certify that on the 30th day of November, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Robert D. Singletary, Assistant Attorney General	robert_singletary@oag.state.ok

Douglas Allen Wilson	doug_wilson@riggsabney.com,
Melvin David Riggs	driggs@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis	

Robert Allen Nance	rnance@riggsabney.com
Dorothy Sharon Gentry	sgentry@riggsabney.com
Riggs Abney	

J. Randall Miller	rmiller@mkblaw.net
David P. Page	dpage@mkblaw.net
Louis W. Bullock	lbullock@mkblaw.net
Miller Keffer & Bullock	

Elizabeth C. Ward	lward@motleyrice.com
Frederick C. Baker	fbaker@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Motley Rice	

### **COUNSEL FOR PLAINTIFFS**

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.	

Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Sidley Austin LLP	

Robert W. George  
Michael R. Bond  
Kutak Rock LLP

robert.george@kutakrock.com  
michael.bond@kutakrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND  
COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables  
Jennifer S. Griffin  
Lathrop & Gage, L.C.

rtl@kiralaw.com  
jgriffin@lathropgage.com

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose  
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com  
rer@owenslawfirmmpc.com

James M. Graves  
Gary V. Weeks  
Bassett Law Firm

jgraves@bassettlawfirm.com

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Conner & Winters, P.C.

jelrod@cwlaw.com  
vbronson@cwlaw.com

Bruce W. Freeman  
D. Richard Funk  
Conner & Winters, LLLP

bfreeman@cwlaw.com

**COUNSEL FOR SIMMONS FOODS, INC.**

John H. Tucker  
Colin H. Tucker  
Theresa Noble Hill  
Rhodes, Hieronymus, Jones, Tucker & Gable

jtuckercourts@rhodesokla.com  
chtucker@rhodesokla.com  
thillcourts@rhodesokla.com

Terry W. West  
The West Law Firm

terry@thewesetlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann Kleibacker Lee  
Dora D. Mann  
Faegre & Benson LLP

dehrich@faegre.com  
bjones@faegre.com  
kklee@baegre.com  
dmann@faegre.com

**COUNSEL FOR CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC**

Michael D. Graves  
D. Kenyon Williams, Jr.

mgraves@hallestill.com  
kwilliams@hallestill.com

**COUNSEL FOR POULTRY GROWERS**

William B. Federman  
Jennifer F. Sherrill  
Federman & Sherwood

wfederman@aol.com  
jfs@federmanlaw.com

Teresa Marks  
Charles Moulton  
Office of the Attorney General

teresa.marks@arkansasaag.gov  
charles.moulton@arkansag.gov

**COUNSEL FOR THE STATE OF ARKANSAS AND THE ARKANSAS NATURAL RESOURCES COMMISSION**

Carrie Griffith

griffithlawoffice@yahoo.com

**COUNSEL FOR RAYMOND C. AND SHANNON ANDERSON**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118  
**COUNSEL FOR PLAINTIFFS**

Thomas C. Green  
Sidley Austin Brown & Wood LLP  
1501 K Street NW  
Washington, DC 20005  
**COUNSEL FOR TYSON FOODS, INC.,  
TYSON POULTRY, INC., TYSON  
CHICKEN, INC.; AND COBB-VANTRESS,  
INC.**

/s/ Philip D. Hixon